

Jb 9640

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN P. BRENNAN, JR., ESQUIRE

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Attorney for plaintiff, Shark River Cleanup Coalition

Shark River Cleanup Coalition :

Plaintiff :

v :

:Civil Action No.

Township of Wall and :

Estate of Fred McDowell, Jr. :

Defendants :

:COMPLAINT AND JURY DEMAND

:Document Electronically Filed

By its counsel, John P. Brennan, Jr., Esquire, plaintiff, Shark River Cleanup Coalition, with an address of PO Box 2241, Neptune City, NJ 07753,, New Jersey, by way of Complaint against defendants, Township of Wall and Estate of Fred McDowell, Jr. , that the defendants have violated and/or threaten a violation of the Clean Water Act, 33 U.S.C. §1251 et seq. (1972), (“CWA”) by discharging and threatening a discharge of pollutants into a navigable water way and for violation of an effluent standard or limitation under the CWA. Plaintiff, with more particularity, says:

THE PARTIES

1. Plaintiff, Shark River Clean-up Coalition, Inc., is a New Jersey Non-Profit Corporation, (“SRCC”) with an address of PO Box 2241, Neptune City, NJ 07753.

2. Defendant, Township of Wall, is a municipal corporation of the State of New Jersey with offices located at P.O. Box 1168, 2700 Allaire Road, Wall, NJ 07719

3. Defendant, Estate of Fred McDowell, Jr., has an address of c/o Francis Fine, 3311 Belmar Boulevard, Wall, New Jersey 07719-4616. Fred McDowell, Jr. is the record owner of property in Wall Township relevant to this complaint. Mr. McDowell died June 15, 2016.

JURISDICTION

4. This Complaint raises federal questions stemming from the defendants' violation of the federal Clean Water Act, 33 U.S.C. §1251 et seq. (1972). This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4). Additionally, all the parties reside or conduct their business in this judicial district, the Court has personal jurisdiction over each of them.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

FACTUAL AVERMENTS

6. The Shark River Clean-up Coalition is a watershed watchdog organization whose mission since its 2001 incorporation is "to significantly enhance the water quality of the Shark River Estuary and its fresh water tributaries, to improve and protect habitats important to the conservation and abundance of wildlife, to protect the recreational and commercial uses from degradation and pollution, thereby ensuring the ecological and economic stability of this important watershed."

7. The Shark River Watershed is the largest watershed in the South Coast Region of Monmouth County's Atlantic Coastal Watershed. It covers an area in excess of 23 square miles. It includes land within the municipalities of Tinton Falls, Colts Neck, Howell, Wall, Neptune, Neptune City, Avon-By-the-Sea, Belmar and Lake Como. This sub-watershed is dominated by medium to high-density residential areas, but still has some remaining natural lands. All lands

within the delineated sub-watershed drains directly to the Shark River.

8. The Shark River Bay is fed by a multitude of feeder streams. The most significant of these streams are the Jumping Brook and Shark River Brook. Jumping Brook is fed by smaller streams including Wells Brook and Hankins Brook. Shark River Brook is fed by Webley's Brook, South Brook, Robins Swamp Brook, Sarah Green Brook, Laurel Gully Brook, Reevey's Branch and other unnamed tributaries. The upland freshwater tributaries empty into the Shark River Bay and ultimately through the Belmar Inlet to the Atlantic Ocean.

9. The waters of the Shark River Bay are brackish. The Bay is an estuary - a unique place where salt and freshwater combine - which serves as a marine sanctuary and nursery. The level of salinity is lower to the western end of the "U" shaped water body. The average tidal water level change is about 6 feet. Due to deteriorated conditions, only two river beaches in this area are currently open for bathing: L Street Beach in Belmar and the Shark River Hills Beach and Yacht Club. An agreement between the Borough of Belmar, the yacht club and the Monmouth County Health Department closes this beach mandatorily for 24 hours following a significant rainfall event to avoid fecal coliform, which occur when the storm sewers are flushed.

10. Many of the river's pollution problems are due to landside practices. Erosion is an increasing concern. The rapid pace of development over the past decades translates to higher levels of stormwater being discharged into the Shark River Bay or its tributary streams and more and more often are causing alarming erosion of the stream banks because of the volume of water being discharged. In turn, this results in a greater accumulation of sediment in the channels and river bottom of the bay.

11. Monmouth County has designated as a "Unique Area" (environmentally sensitive

areas worthy of preserving from developmental pressures) the Estuarine Pond located on the Shark River, in the vicinity of Brighton Avenue and its border between Wall and Neptune Townships. More a marsh than a pond, this area was considered unique as a wildlife habitat, marsh, coastal flood plain and scenic area. The area supports a vegetative community consisting of Sweet Pepperbush, Hightide Bush, cattails, rushes, Common Reed and various spartine grasses. The area also supports a diverse bird community, including the endangered Bald Eagle and Black Skimmer as well as a nesting pair of Osprey, which are on the Threatened Species list. There is a large population of songbirds as well as migratory and fowl populations. The Shark River Watershed provides suitable habitat for dozens of threatened and endangered mammals, fish, amphibians, reptiles, and plant and avian species.

12. Another designated "Unique Area" is the Glendola Reservoir. It is located north of Belmar in Wall Township. The Glendola Reservoir is a source of potable drinking water operated by the New Jersey American Water Company ("NJAWC"). The water is pumped to a facility from the Shark River Brook and Jumping Brook and is stored for treatment and use. The reservoir is primarily bowl shaped, ringed with forested wetlands, forested uplands and residential developments. It holds approximately one billion gallons of water. NJAWC also pumps water from the Shark River Brook directly to its Jumping Brook Treatment Plant located on Old Corlies Avenue in Neptune Township. This Plant provides part of the potable water for approximately 245,000 customers in the municipalities of Avon, Bradley Beach, Belmar, Lake Como, Neptune City, Neptune Township, Bay Head and Tinton Falls.

13. As surface water, the Shark River and its tributaries are protected by a regime of environmental statutes, regulations and ordinances which implement the policies and goals of the

CWA. . The New Jersey Department of Environmental Protection (“DEP”) administers the Surface Water Quality Standards (SWQS), N.J.A.C. 7:9B, for the protection of surface water quality of the waters of the State. The DEP develops and administers the SWQS pursuant to the Water Quality Planning Act (WQPA), N.J.S.A. 58:11A-1 et seq., and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. The SWQS are further developed and administered in conformance with the requirements of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., commonly known as the Clean Water Act (CWA), and the Federal regulatory program established by the United States Environmental Protection Agency (USEPA) at 40 CFR § 131. The SWQS include general requirements, use classifications, antidegradation categories, and water quality criteria applicable to the surface waters of the State. The SWQS are established to address the DEP’s responsibility to conduct a continuous planning process pursuant to Section 303 of the CWA, 33 U.S.C. § 1313, and the WQPA, N.J.S.A. 58:11A-1 et seq.

14. The SWQS are intended to aid the DEP in its implementation of the New Jersey Pollutant Discharge Elimination System (NJPDES) rules (N.J.A.C. 7:14A); Freshwater Wetlands Protection Act (N.J.A.C. 7:7A); Coastal Zone Management rules (N.J.A.C. 7:7E); Flood Hazard Area Control rules (N.J.A.C. 7:13); Stormwater Management rules (N.J.A.C. 7:8); and Water Quality Management Planning rules (N.J.A.C. 7:15).

15. The SWQS establish three categories of antidegradation protection: Outstanding National Resource Waters (ONRW); Category One waters; and Category Two waters. “Category One waters,” are defined in the SWQS at N.J.A.C. 7:9B-1.4 as “those waters designated . . . for protection from measurable changes in water quality characteristics because of their . . .

exceptional ecological significance [or their] exceptional water supply significance . . .”

16. On June 6, 2005, the NJDEP designated the Shark River Brook from its source to Remsen Mill Road to a Category One status based upon its “exceptional water supply significance” to the Glendola Reservoir. The Category One waters of Shark River Brook run across the Property and in close proximity to the complained of sanitary sewer pipe.

17. Fred McDowell, Jr., P.O. Box 119, Wall, New Jersey 07719 (“McDowell”) is the owner of real property known as Block 930, Lot 1, on the Tax Map of the Township of Wall, New Jersey. The property consists of 459.97 acres in the RR6 zone and has a street address of 1401 Schoolhouse Road, Wall, NJ (the “Property”). McDowell operates a sand and gravel mining operation on the Property.

18. On November 1, 1991, the Township of Wall (“Wall Township”) recorded in the Monmouth County Clerk’s Office a certain Amended Declaration of Taking in the matter of Township of Wall v Fred D. McDowell, Superior Court of New Jersey, Law Division, Monmouth County, New Jersey, Docket No. L-56767-88, at Deed Book 5101, Page 0957. (“Declaration of Taking”). The Declaration of Taking memorialized a certain Consent Judgment between Wall Township and McDowell whereby Wall Township paid McDowell, \$200,000, for acquisition of a “permanent subterranean easement and temporary construction easement” and a “fee interest for construction of a sanitary sewer pump station” on the Property.

19. Subsequently, Wall Township constructed the sanitary sewer trunk line across the 25 foot wide subterranean sanitary sewer easement that runs from Campus Parkway in an easterly direction across the Property to the Garden State Parkway over 3.15 miles (16,341 feet) distant. The layout of the sewer lines runs largely parallel and in close proximity to the Shark River

Brook, a C-1 designated tributary to the Shark River. The terrain it transverses is predominantly historic glacial sand deposits in New Jersey's coastal plain. The sand has a fragile layer of scrub pine and oak vegetation ecosystem.

20. The Declaration of Taking is silent regarding McDowell and Wall Township's respective obligations to maintain the easement. On April 5, 2016, SRCC submitted an New Jersey Open Public Records Request ("OPRA") to Wall Township requesting "all documents creating [the] sanitary sewer easement on [the] property, evidencing the installation of sanitary sewer [line] on the property and evidencing maintenance of the sanitary sewer [line] on the property for the period 2000 to present". In response, Wall Township shockingly advised that it has no responsive documents.

21. The installation of the sanitary sewer line disturbed the vegetative cover of the sand in which the subterranean pipe was installed. That disturbance and the obvious lack of maintenance of the easement has created a dangerous condition. Several sections of the sewer pipe have been undermined and are "flying" in the air without support. (Photos available upon request). This condition threatens the structural integrity of the active sanitary sewer pipe within a short reach of the Shark River Brook. Furthermore, in other locations, due to the installation of the pipe and failure to maintain the easement and the activities being conducted by the owner of the property, large areas of sand have "washed out" and infiltrated and discharged into the Shark River Brook. These conditions are violations of the Clean Water Act. It also has damaged and threatens to further damage the Shark River Watershed. Indeed, despite the April 2016 OPRA Request alerting Wall Township, no one has taken any steps to rectify the precarious situation.

22. The unmitigated historic and continuing release of washed out sand from the sanitary

sewer easement into the Shark River Brook and the threatened release of sanitary sewer effluent from the sanitary sewer pipe all constitute un-permitted discharges of pollutants into the Shark River, a navigable waterway protected from such discharges under the Clean Water Act.

23. On October 4, 2016, SRCC provided notice to the defendants pursuant to 33 U.S.C. § 1365 and 40 CFR § 135.1, that it intended to commence suit pursuant to the Clean Water Act, 33 U.S.C. §1251 et seq. (1972). Despite this, the defendants took no action to remediate or mitigate any of the above described conditions.

FIRST COUNT

Clean Water Act, 33 U.S.C. §1251 et seq. (1972)

24. Plaintiff, Shark River Cleanup Coalition, reiterates each and every allegation contained in Paragraphs 1 to 23 as if set forth more fully here.

25. The defendants' actions and omissions constitute a violation of the Clean Water Act, 33 U.S.C. §1251 et seq. (1972).

26. As a result of the defendants' violation of the CWA, the plaintiff has been damaged.

WHEREFORE, plaintiff, Shark River Cleanup Coalition, demands judgment, jointly and severally, against defendants, Township of Wall and Estate of Fred McDowell, Jr. , for an mandatory injunctive requiring the defendants to remediate and mitigate the environmental conditions complained of and for damages compensatory, liquidated and incidental, together with attorneys fees and costs of suit.

JURY DEMAND

Plaintiff, Shark River Cleanup Coalition, demands a trial by jury on all issues so triable.

Dated: October 10, 2017

/s/ *John P. Brennan, Jr.*

John P. Brennan, Jr.

Attorney for plaintiff, Shark River Cleanup Coalition